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Supreme Court, U.S.
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In The

Supreme Court of the United States

CORRIE MILES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Athanasios K. Preovolos, Esq.
PREOVOLOS & ASSOCIATES, ALC
401 B Street, Suite 1520
San Diego, CA 92101
(619) 696-0520
Thanasi@thelawcorp.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the United States Court of Appeal for the Ninth Circuit erred in upholding Respondent Commissioner of the Internal Revenue's determination that a levy under Internal Revenue Code §6331 extends to the assets of a retirement plan qualified under the Employee Retirement Income Security Act when the plan participant has neither plan assets in her possession nor a present right to payments/distributions from the plan.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Corrie Miles, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported, but is attached in the Appendix. (App. A) The opinion of the United States Tax Court is reported at 2010 WL 3937958 (9th Cir. Oct. 7, 2010). (App. B).

STATEMENT OF JURISDICTION

The Memorandum from the United States Court of Appeals for the Ninth Circuit was filed October 7, 2010 by KOZINKSKI, Chief Judge, WARDLAW, Circuit Judge, and SINGLETON, Senior District Judge (Case No, 07-74476; Tax Ct. No. 16887-05L). This writ of certiorari is filed within ninety (90) days thereof. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CITATIONS OF STATUTES

The relevant statutory provisions involved are Internal Revenue Code § 6331 (App. C), Internal Revenue Code § 6334 (App. D), 29 U.S.C. § 1053(a)(1) (App. E), 29 U.S.C. § 1056(a) (App. F), and 28 U.S.C.

§ 1254(1) (App. G), the text of which are set out in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner seeks review of the Ninth Circuit's decision allowing the Respondent to immediately levy the assets of an ERISA plan that she participates in even though the ERISA plan is not currently in payout status to Petitioner.

Petitioner was originally assessed tax liability by the Respondent for the years the tax years ending December 31, 1997 and December 31, 1998 because she filed joint tax returns with her husband at the time – even though the tax liability was incurred exclusively by her husband. Petitioner subsequently filed for divorce. Respondent sought to enforce the tax liability assessment against Petitioner individually and filed several Federal Tax Lien's on Petitioner's Individual Retirement Account (IRA). Petitioner then filed for Chapter 7 bankruptcy protection and her tax liability was discharged. Petitioner then gained employment with a California corporation with an ERISA plan, and she ultimately rolled her IRA into her employer's ERISA plan.

Respondent contends that the liens it filed on Petitioner's IRA before she filed for bankruptcy protection survive the bankruptcy proceeding, follow the transfer of the IRA assets into the ERISA plan, and attach to the ERISA plan assets. Respondent provided three alternatives to Petitioner: (1) disgorge the account assets within thirty (30) days;

(2) allow a levy on the account assets to avoid early withdrawal penalties, or (3) if neither of the previous two options were palatable, Petitioner could appeal Respondent's Notice of Determination.

Petitioner could not disgorge the assets of the ERISA plan because she was neither the trustee of the ERISA plan nor was she entitled to any payments from the ERISA plan. Whether petitioner agreed to a Federal Tax Levy on the ERISA plan was a moot point because there is no authority that allows a Federal Tax Levy to extend to the assets of an ERISA plan in Petitioner's situation. Respondent's Notice of Determination stated that Respondent could immediately levy assets of the ERISA plan to satisfy the Federal Tax Liens filed prior to Respondent's bankruptcy petition. Petitioner appealed to the United States Tax Court and then to the United States Court of Appeal for the 9th Circuit seeking a determination that Respondent abused its discretion prior to and in accordance with the issuance of its Notice of Determination.

REASONS WHY PETITION SHOULD BE GRANTED

Neither Internal Revenue Code § 6331 nor United States v. Novak 476 F. 3d 1041 (9th Cir. 2007) provide Respondent with authority to levy the assets contained in an ERISA plan which Petitioner currently participates in as an employee of Chapters, Inc., a California corporation.[1] Respondent, the Tax

1. Petitioner has been continuously employed with Chapters, Inc. as a copy editor since October 2004.

Court and the Ninth Circuit relied on both and therefore erred in reaching their determinations.

1. A Levy Extends Only to Property Possessed at the Time of the Levy

Internal Revenue Code § 6331 provides power to the IRS to levy certain taxpayer assets to satisfy liens. The term "levy" includes the power of distraint and seizure by any means. § 6331(b). Except as otherwise provided in § 6331(e) [salary and wages], a levy shall extend **only** to property possessed and obligations existing **at the time thereof**. *Id.* The IRS can collect tax liabilities if there is a validly existing lien on the **accrued** salary or wages of a taxpayer by providing notice of levy to the taxpayer's employer. § 6331(a). And, a levy can only be continuous in limited circumstances: (1) when first made on the taxpayer's salary and wages (§ 6331(e)) and/or (2) on specified payments under § 6331(h)(1)[2]. In summary, a levy **only** applies to a property possessed **at the time of** the levy.

2. A Plan Participant Does Not Possess the Assets of an ERISA Plan

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2. "Specified Payment" means (A) any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee, (B) any payment described in paragraph (4), (7), (9), or (11) of Section 6334(a), and (C) any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act. § 6331(h)(2).

A participant in an ERISA plan does not possess any assets until she has met certain qualifications. ERISA only guarantees a participants a right to begin receiving payments sixty days after the close of the year in which they turn sixty-five, complete ten years of service with the company, or leave the company, whichever occurs latest. 29 U.S.C. §1056(a). Until that qualifying event, the plan participant does not possess any assets of the ERISA plan.

Respondent is a plan participant in her employer's ERISA plan, she has been continuously employed with Chapters, Inc. since October 2004, she has worked at Chapters, Inc. less than ten (10) years, and she is not close to sixty-five years old. Petitioner did not possess assets in the ERISA plan at the time Respondent sought to extend its levy.

Respondent agrees to an extent. Specifically in correspondence from IRS counsel's to Petitioner's counsel on September 20, 2006, the IRS admitted that "The Services' right to payment as a result of a levy on a pension plan is only as extensive as the taxpayer's right to payment. If the taxpayer is currently entitled to monthly payments, the Service is entitled to receive those monthly payments by levy. See, e.g., Shanbaum v. United States, 32 F. 3d 180 (5th Cir. 1994). If the taxpayer only has the right to receive payments at some future date (e.g., upon retirement and/or a specific age), then the Service is not entitled to receive any payments as a result of its levy until such future date." Respondent's position to date has been that last sentence. And the

Tax Court and Ninth Circuit both agree with Respondent on the presumption that an ERISA plan participant has a nonforfeitable right in the accrued benefits of the plan. 29 U.S.C. § 1053(a)(1).

However, a "nonforfeitable right" is not synonymous with "property possessed" and by the explicit language of § 6331, a levy only applies to the latter. Therefore, the finding by Respondent, the Tax Court and the 9th Circuit is in error on that particular point. There can be no levy until Petitioner has a possessory property interest in the ERISA plan – a payout of the ERISA plan assets.

3. The Two Prong Novak Test Does Not Apply to Petitioner

In United States v. Novak 476 F. 3d 1041 (9th Cir. 2007), the Ninth Circuit determined that a Federal Tax Levy can demand (1) that a retirement plan directly pay to the IRS any post-retirement payments that otherwise would have automatically gone to the taxpayer; and (2) if the plan allows the participant to demand payment before retirement or at a different rate - including immediate payment of the entire present value of benefits - the full amount that the participant could presently demand.

The first prong of Novak is not applicable to Petitioner. While the Ninth Circuit found that a Federal Tax Levy can demand that an ERISA plan pay directly to the IRS any post-retirement payments that otherwise would have gone to a taxpayer, in this instance the ERISA plan is NOT a

party to this proceeding. Further, the ERISA plan must be in payout status to the taxpayer in order for the first prong to apply in conjunction with § 6334. A levy cannot extend to an ERISA plan or the assets thereof, unless the plan participant possesses the assets at the time of the levy. In the ERISA arena, that only occurs with regard to post-retirement payments. There simply is no authority that the levy applies but merely "sits out there" until such time as the ERISA plan enters payout status. § 6334 is explicit: the IRS can swoop in and levy an existing asset and in limited circumstances it can continue to levy payments of salaries, wages and specified payments. There is no provision that a levy applies to any and all payment distributions from an ERISA plan in payout status – continuously. A levy could only apply to a plan participant's assets in the ERISA plan if the plan participant can demand a lump sum distribution upon retirement or upon the first distribution payment.

The second prong of Novak is not applicable to Petitioner because a participant in an ERISA plan has no right to demand payment – the plan is either in payout status or not[3]. The Ninth Circuit tangentially found that if the assets were held in an IRA or annuity, the IRS could levy the plan assets and demand immediate payment – albeit presumably subject to the requisite tax and penalties. It wouldn't be an ERISA plan if a plan

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3. Again ERISA only guarantees participants a right to begin receiving payments sixty days after the close of the year in which they turn sixty-five, complete ten years of service with the company, or leave the company, whichever occurs latest. 29 U.S.C. § 1056(a).

participant could demand payment before one of those qualifying events. And if the plan participant cannot demand an immediate payment from an ERISA plan, the plan participant cannot be deemed to have a possessory interest.

As stated, Petitioner cannot comply with the Respondent's demand to either disgorge the ERISA plan assets or allow a levy on the ERISA plan assets to avoid early withdrawal penalties. Nor can Respondent extend a levy to the ERISA plan as it is not in payout status to Petitioner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Athanasios K. Preovolos, Esq.
PREOVOLOS &
ASSOCIATES, ALC
401 B Street, Suite 1520
San Diego, CA 92101
(619) 696-0520

Counsel for Petitioner